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AUTHORITIES CITED

754148—47——1

In the Supreme Court of the United States

OCTOBER TERM, ~~1946~~ 1947

No. 118

HOME BENEFICIAL LIFE INSURANCE CO., INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 465–474) is reported in 159 F. 2d 280. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1–66) are reported in 69 N. L. R. B. 32.

JURISDICTION

The decree of the court below (R. 474–475) was entered on January 7, 1947. The petition for rehearing filed by the company (R. 477–494) was

Upon the expiration in December 1942 of the second of these contracts, lengthy negotiations were undertaken by petitioner and the Union for a new contract (R. 16; 186–188, 283). In the course of these negotiations the Union requested petitioner to modify its reporting-in rule so as to reduce the number of days on which the agents were required to report in to their offices, because of the gasoline shortage at that time (R. 17; 120). Petitioner refused to alter its rule (R. 17; 120–122, 124, 307, 342–343, 344–345). On August 8, 1944, the Union filed strike notices under the War Labor Disputes Act (57 Stat. 163, 50 U. S. C. App., Supp. V, 1501 *et seq.*) requesting that a strike vote be taken, but was officially informed that the War Labor Disputes Act did not apply to petitioner (R. 18–19; 307–308, 437–440). The Union so advised petitioner and stated that it accordingly considered itself free to strike at any time and that a work stoppage might occur (R. 19; 124, 362).

On October 9, 1944, the Washington local of the Union wired petitioner that the Washington agents had voted to report in to their offices only two days a week (R. 19–20; 246, 319–320).[3] Petitioner wired back that any violation of its reporting-in rule on and after October 11 would result in

[3] Accordingly the agents did not report in on October 10; they did report in on October 11 and 12 (R. 20–23; 93, 102).

dismissal (R. 20; 126, 247). Faced with this warning, the Washington local voted on October 12 to go on strike the following day unless the dispute was settled at a meeting scheduled with petitioner for that evening (R. 20–21; 103, 383, 384). The meeting failed to resolve the dispute (R. 21; 76, 99–100). Accordingly, before the conferences came to an end, Union counsel informed petitioner that the Washington agents would not report for work the following day and that "agents who did not report for duty tomorrow or any other time did so for the purpose, by concerted action, of enforcing" their demand for a modification of the reporting-in rule (R. 22; 78). Petitioner responded that if they were going on strike, the Union should not "get so technical" (R. 22; 78, 94, 100). Petitioner also stated that it was "prepared" for a "strike" and might as well have it then as at any other time (R. 95). A telegram reiterating the Union statement was sent to petitioner the following morning (R. 22; 79–80, 103, 240). On October 13, 1944, most of the Washington agents went on strike, engaging in a complete work stoppage (R. 22; 322). Petitioner, predicating its action on its warning that any agent failing to report to the office prior to going out on his route would be fired, discharged all who failed to appear that morning (R. 22; 68, 388, 400). Several other agents who reported to the office and worked on that day, subsequently joined the

strike and were thereupon also discharged (R. 23; 370–371, 372).[4]

A similar sequence of events took place at petitioner's Norfolk office. The Norfolk agents, like those at Washington, determined on October 13, 1944, to report in to the office only 2 days a week, and were warned that such a violation of the 5-day reporting rule would result in dismissal (R. 23–24; 168, 171, 348, 349, 375, 420). Thereupon, on October 20, 1944, a number of the Norfolk agents went on strike (R. 24; 348, 349, 378, 401–402, 407). Here petitioner admittedly was aware that the men were on strike and yet, as at Washington, it promptly discharged the striking agents for failing to report in (R. 24; 68, 168–170, 365, 373–376, 377–378, 388, 401, 420–421).

On October 19, a number of petitioner's Petersburg agents went on strike in sympathy with the Washington agents and to secure their reinstatement (R. 25; 68, 172–174, 389, 402). Thereafter, in succession, between October 19 and October 30, the Union locals in Knoxville, Lynchburg, Staunton, Portsmouth, and Baltimore also went on strike in sympathy with the Norfolk and Wash-

[4] Petitioner introduced evidence at the hearing before the Board indicating that a minority of the Washington agents, although not reporting at the office on October 13, otherwise went about their regular duties (R. 23; 161; 371). Testimony to the contrary was also adduced (R. 38; Tr. 2488–2495, 2947–2958, 2742–2749, 2750–2775). The Board, however, made no final resolution of the factual issue thus raised (R. 36–38).

ington agents, and to secure their reinstatement (R. 25; 68, 172, 176–180, 329–330, 354–355, 389–391, 403–405).

Negotiations between petitioner and the Union continued during the strike and on November 11, 1944, the Union, on behalf of the strikers, informed petitioner that the strikers were tendering their services to petitioner unconditionally and were prepared to resume work (R. 3, 28–29, 40–41; 88, 241, 323–324, 327–328, 337, 349–350, 355–356). Petitioner rejected this tender, stating that without a solution of all matters in dispute during the negotiations, it was unwilling to reemploy any of the strikers (R. 29; 86–87, 134–136, 241–243, 323–324, 328, 331–332, 338, 349–350, 356).

On this date, save for perhaps one exception, no new employees had been hired to fill the jobs held by the agents prior to the strike and all of these positions were then available (R. 29; 370, 376, 377, 379, 380, 381).[5]

Upon these facts the Board found that the conduct of the Washington and Norfolk strikers in ceasing work in protest against the reporting-in rule and the conduct of the agents in other district offices in striking in sympathy, constituted con-

[5] On the same day that the strikers made the request for reinstatement, but whether before or after the request does not appear from the record, a new employee, Philips, was hired to fill the job of Chaplin, a striker (R. 29; Tr. 2068). One witness, however, testified that he had heard that Chaplin had died during the course of the hearing (R. 29; 380).

certed activity within the meaning of Section 7 of the Act (R. 2). The Board accordingly found that inasmuch as these employees "ceased work as a result of a current labor dispute," they remained employees within the meaning of Section 2 (3) of the Act (R. 2). The Board therefore held that petitioner's refusal to reinstate the striking employees on their unconditional request constituted a violation of Section 8 (1) and (3) of the Act (R. 3). Consequently, the Board, to effectuate the policies of the Act, required petitioner to reinstate all the striking employees and give them back pay from November 11, 1944, the date of its refusal to reinstate (R. 3, 5–6).

On July 15, 1946, petitioner filed in the court below a petition to review the Board's order (R. 449–452). The Board filed its answer and request for enforcement of the order (R. 453–461). On January 7, 1947, the court entered its opinion (R. 465–474) in which it held that the Washington agents had engaged in a lawful strike on October 13 (R. 469, 471), but that petitioner was unaware of the strike and discharged these employees because it mistakenly supposed that the strikers were merely refusing to report to the office prior to commencing work (R. 469–470). The court held further that the status of the strikers as employees was protected by Section 2 (3) of the Act and that they could not be discharged for engaging in a lawful and protected activity despite petitioner's mistaken belief that their conduct was

merely a violation of a working rule (R. 471). The court concluded, therefore, "that the men who struck on October 13 and offered to return on November 11 are entitled to reinstatement" (R. 471). In view of its holding, however, that only those Washington employees who were actually on strike were protected (R. 471–473), and in the absence of a Board finding as to which of the employees did not cease work, but merely refrained from reporting in to the office, the court remanded the case to the Board to make such a determination so that their names might be omitted from the list of those to be reinstated (R. 473).[6] The court agreed with the Board that the strikers on November 11 had unconditionally offered to return to work (R. 469, 474) and therefore enforced the Board's order as to all the strikers outside Washington (R. 474).

On January 7, 1947, the court entered its decree in accordance with its opinion (R. 474–475). Petitioner's request for rehearing was denied on March 10, 1947 (R. 476–494, 496–497).

ARGUMENT

1. The issues raised by the petition for certiorari are predicated on the conclusion of the court below that the company did not know at the time it discharged the Washington agents that they

[6] The court below also, under its remand, instructed the Board to consider anew the date from which the back pay of the Washington strikers should run (R. 473). Petitioner raises no question as to this matter.

had ceased work by reason of a strike. The evidence, we submit, fully supports the Board's finding (R. 22, 37) that the company was not under any such misapprehension.

In addition to the statement and telegram advising the company that "agents who did not report for duty tomorrow or any other time did so for the purpose, by concerted action, of enforcing demands for relief from a situation created by the gas shortage" (R. 78, 240, 94), a union representative testified that Mr. Tucker, counsel for the company (R. 107), said, after Mr. Thatcher had made the above statement (R. 94–95):

> "Oh, Herbert, don't get so technical. You mean you are going to strike?"
>
> * * * * *
>
> And he said, "I am advising you now that any one that fails to report tomorrow will be discharged."
>
> Q. Was anything further said:
>
> A. I said to Mr. Tucker, I said: "Well this is a pretty pace we have come to."
>
> Mr. Tucker said: "Yes, we have been looking for this for some time. We expected to have a strike sooner or later and we might as well have it now. We are prepared for it now as well as we will be at any other time."
>
> Q. Did you hear anybody else say anything?
>
> A. With that, Mr. Franklin, president of the Washington Local addressed him-

> self to Mr. Tucker and said: 'Mr. Tucker, do I understand you correctly that when none of us report tomorrow, if we don't report tomorrow, that we are discharged despite the fact that we are in concerted action?'
>
> Mr. Tucker said, "You are fired if you don't report."

Since the Board's finding that the company knew that the men were going on strike before it discharged them is adequately supported, there is no need for reaching or determining the issue raised by petitioner and passed upon by the court below.

2. The question posed by the decision below as to an employer's right to discharge for concerted activity when he acts under a misapprehension is one which is not likely to arise except in the most unusual situation and which is therefore not of general importance. In any event, we submit, the decision below on the point is correct.

Petitioner does not challenge the general principles (summarized by the court below (R. 470–471)) that the Act prohibits the discharge of employees merely because they have taken part in a strike and that the Board may order the reinstatement of strikers whose positions have not been filled. Basing its argument on the court's finding that the company was unaware of the strike at the time of the discharges, petitioner urges that the decision below compels it to reinstate striking employees whose discharges were

motivated by reasons other than those proscribed by the Act. From this, petitioner concludes, there could have been no anti-union animus in its discharges and no discrimination within the meaning of the Act. To buttress this conclusion, petitioner cites language from *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, to the effect that an employer may exercise freely his right to discharge employees for any cause that seems to him proper "save only as a punishment for, or discouragement of, such activities as the Act declared permissible" (Pet. 7–8).

This is undoubtedly true in the normal situation where motive is the all-important factor. Since the passage of the Act, those employers who discharge employees because of their union activities are loathe to assert that fact, but almost invariably seek to justify the discharge on other grounds, for example, the alleged inefficiency or other shortcoming of the employee. Where such grounds are alleged, the issue is the employer's true motive; the discharge is of course valid unless it is established that the reason offered was merely a pretext and the true cause was the desire to interfere with or discourage legitimate union activities. Such a situation was present in both the *Jones & Laughlin* and *Associated Press* cases, *supra*. See *Matter of Jones & Laughlin Steel Corp.*, 1 N. L. R. B. 503, 511–515; *Matter of The Associated Press*, 1 N. L. R. B. 788, 794–800.

It was in this frame of reference that the Court passed on the above cases. But even in those cases, the Court carefully articulated the basic purpose of the Act as a guarantee of the right of employees to organize, to bargain collectively, and to engage in concerted activities for mutual aid and protection without restraint or coercion by the employer. *Jones & Laughlin, supra,* at p. 33; *Associated Press, supra,* at p. 129, 132.

In this case an employer seeks no pretext for a discharge but asserts as a ground for discharge conduct constituting part of the activities which the Act protects. In such a situation, the interference with the rights which the Act was essentially designed to guarantee is direct and basic, and the motive of the employer becomes immaterial. In *Republic Aviation Corp.* v. *National Labor Relations Board* and *National Labor Relations Board* v. *LeTourneau Company of Georgia,* 324 U. S. 793, at 805, this Court held that violations of the Act may be found despite an express recognition that the employer's conduct was not motivated by opposition to a *particular union or to unionism* in general (*id.,* at 795, 797, 805).[7]

[7] In the *Republic* case, one employee was discharged for violation of a no-solicitation rule, and others for wearing union steward insignia contrary to the employer's orders. In the *Le Tourneau* case, employees were laid off for distributing union literature on the company parking lot in violation of a rule prohibiting distribution of any literature there.

So here, where the employer discharged the striking agents for failure to report to the office, when such failure to report was necessarily involved in the act of striking, the employer's disciplinary action, regardless of his intent or motive, discriminated in the most real sense against the right to strike. Petitioner's mistaken belief, however honestly entertained, that merely a rule of employment was being violated cannot convert lawful and protected concerted activity, such as the strike here involved, into unlawful conduct which the Act does not protect.

This is by no means a novel doctrine, either under the National Labor Relations Act or in the field of the law in general. Thus in *Matter of Mid-Continent Petroleum Corp.*, 54 N. L. R. B. 912, 933–934, decided by the Board in January 1944, it was held that where certain strikers were discharged for allegedly participating in a sit-down strike, the discharges were invalid since it was not affirmatively established that the strikers did in fact engage in such conduct. The Board specifically rejected the employer's contention in that case that as long as he believed in good faith that the employees did engage in a sit-down strike, the discharges were valid.

The doctrine that an individual, once having obtained a right either by contract or by operation of law, may not be deprived of that right because of another's mistake is now firmly estab-

lished in the law. As Professor Williston says in his treatise, "A justification for a refusal to carry out a contract cannot be found in the mistaken belief or opinion, however reasonable, of the existence of supposed facts which if true would have justified the refusal." 3 *Williston on Contracts,* Sec. 839. The person making the mistake must bear the consequences of his error. So also where improvements are made on another's property by mistake, the improver may not recover from the owner. *Green* v. *Biddle,* 8 Wheat. 1; *Rest. of Restitution,* Secs. 40, 41. Similarly, a trespass upon another's land is none the less a trespass because the intruder reasonably but mistakenly believes that he has the right or privilege to intrude. *Rest. of Torts,* Sec. 164. So here petitioner must bear the consequences of his error where in fact he discharged the striking agents for activities in which they had a right to engage.

This is not to say, as petitioner would have us believe (Pet. 6), that the existence of a strike precludes the otherwise valid exercise of the right to discharge. That right is limited only where the discharge is for conduct inherent in the nature of a lawful strike for a lawful purpose. Thus, where the strike takes on an unlawful aspect, or is conducted in an unlawful manner, or for an unlawful purpose, the strikers may be validly discharged. *National Labor Relations*

Board v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 254 (sit-down strike); *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332 (strike in violation of a no-strike clause in an existing contract); *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31 (mutiny).

3. The second question propounded by petitioner (Pet. 2, 9–10)—whether it could be required to reinstate striking employees whose request for reinstatement was conditioned on the reinstatement of employees who had been validly and effectively discharged—is, we submit, not presented on the facts of this case. Both the Board (R. 3) and the court below (R. 469) expressly found on substantial evidence (*supra* p. 7) that the request for reinstatement was unconditional. Indeed, petitioner does not seriously question the evidentiary bases for this finding. Instead, it argues (Pet. 9–10) that the court, in so finding, did not consider certain other facts recited in its opinion. Such an assumption is completely unwarranted.

4. The court below remanded the case to the Board for further findings as to the status of the Washington strikers and the validity of their discharges. Until the Board has made its findings as to which of the agents, if any, were invalidly discharged the question as to the validity of the present order of reinstatement is at an interlocutory stage.

CONCLUSION

The decision below is correct with respect to all the issues raised herein. There is no conflict of decisions and no question of general importance is raised. Moreover, the questions presented by the petition have not been finally adjudicated. The petition should, therefore, be denied.

Respectfully submitted.

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JULY 1947.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" * * * shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

* * * * *

SEC. 10.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

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